FILE COPY

DEC 24 1964
JOHN F. DAVIS, CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1964

No. [redacted] 808

HELEN DOLMAN, LAWRENCE RUST LEE, JAMES KEITH MARSHALL, JR., E. P. R. DUVAL, and KATHERINE HANSBROUGH,
Cross-Petitioners,

vs.

PIOCHE MINES CONSOLIDATED, INC., ELY VALLEY MINES, INC., and JOHN JANNEY,
Cross-Respondents.

CROSS-PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals for the Ninth Circuit

GEORGE T. DAVIS,
Suite 1317 Mills Tower,
220 Bush Street,
San Francisco 4, California,
Counsel for Cross-Petitioners.

Subject Index

	Page
Opinions below	2
Jurisdiction	2
Questions presented	2
Rules involved	4
Statement	4
Reasons for granting the writ	9
Conclusion	14
Appendix: Federal Rules of Civil Procedure:	
23(b)	
37(d)	

Table of Authorities Cited

Cases

	Pages
Elk Fork Oil Co. v. Foster, 99 Fed. 495	10
Ferguson v. Bucks, 280 Fed. 2d 739	10
Tennessee Publ. Co. v. Carpenter, 100 Fed. 2d 728	10

Rules

Federal Rules of Civil Procedure:	
23(b)	13
37(d)	6, 10

Texts

2 Clark, Receivers, p. 1065	12

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1964

No. 643

HELEN DOLMAN, LAWRENCE RUST LEE, JAMES KEITH MARSHALL, JR., E. P. R. DUVAL, and KATHERINE HANSBROUGH,
Cross-Petitioners,

vs.

PIOCHE MINES CONSOLIDATED, INC., ELY VALLEY MINES, INC., and JOHN JANNEY,
Cross-Respondents.

CROSS-PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

Cross-Petitioners* pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in

*Helen Dolman, Lawrence Rust Lee, James Keith Marshall, Jr., E. P. R. Duval and Katherine Hansbrough.

this case on May 21, 1964, from which petitions for rehearing were denied on August 3, 1964.

OPINIONS BELOW

The judgment of the United States District Court for the District of Nevada appears at R. 1238.

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 333 F.2d 257.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was made and entered on May 21, 1964, a copy of which is appended to the Petition for a Writ of Certiorari filed by the Cross-Respondent in this matter, at pages 35-37 of the appendix to that petition. The Opinion appears at pages 1-33 of the appendix to that petition. Petitions for Rehearing were denied on August 3, 1964. (Record, Vol. 24.)

The jurisdiction of this Court is invoked under 28 United States Code §1254(1).

QUESTIONS PRESENTED

1. If a court has power to enter defaults against corporate defendants because of the wilful failure of their president and dominant figure to appear for a deposition, in what has been judicially described as

a direct flaunting of the court's authority, is the entering of defaults proper even though at one point counsel stated that no such relief was being asked against the corporations?

2. If a complaint in a shareholders' derivative suit seeks injunctive relief which would bar corporate officers from taking action in connection with corporate affairs, may the court, in granting a default judgment, appoint a receiver to protect the corporate interests pending a stockholders' meeting, even though the original complaint did not specifically ask for a receivership appointment?

3. If a court, apparently acting with full authority, appoints a receiver who in good faith expends money, time and effort to carry out his duties, is it not proper to compensate that receiver for the value of his services and to reimburse him for all money which he has expended in the corporation's behalf, even though an appellate court later determines the appointment was erroneous?

4. If a corporate shareholder successfully develops litigation against the president and dominant figure of a corporation, so that the corporation receives the benefit of a one million dollar judgment against that officer, is it not proper to compensate the shareholder for the value of her services and those of her attorneys, and to reimburse her for money which she has expended in the corporation's behalf even though she was not a shareholder of record when the disputed transaction took place?

RULES INVOLVED

(These are printed in the Appendix)

Federal Rules of Civil Procedure:

23(b)

37(d)

STATEMENT

In a shareholders' derivative action on behalf of the shareholders of two mining corporations, Ely Valley Mines, Inc., and Pioche Mines Consolidated, Inc., the cross-petitioners here (plaintiffs below) charged, among other things: that John Janney (a cross-respondent here) had managed, directed and controlled all the activities of the corporations (which were made nominal defendants and which are also cross-respondents here); that the properties, assets and business of the corporations had been abandoned by the corporation, by their management and directors, and by Janney; and that for many years Janney had mismanaged corporate affairs, wasted corporate assets, and employed corporate properties for his own personal benefit and use, to the shareholders' detriment. (R. 624-25.)

The cross-petitioners prayed, among other things, that the corporations and Janney be restrained from exercising any control or entering into any transaction with regard to the corporations until further order of the federal district court. (R. 628.)

After the cross-petitioners had served notices of their intent to take Janney's deposition, expresssly as president of each of the two corporations and also in an unspecified capacity, Janney failed to appear. (T. 459, 465-68, 482-86.) His failure was characterized by the Ninth Circuit Court of Appeals as "not merely intentional; it was a direct flaunting of the authority of the court." (Opinion, p. 19.)

At this time there was pending a motion for appointment of a receiver for the two corporations. (T. 946; R. 726-744.)

Because of Janney's contumacious failure to appear, cross-petitioners moved to strike his pleadings. Counsel for cross-petitioners then stated, accurately, that no relief was prayed against the corporations and, inaccurately, that no pleadings had been filed by the corporations. (T. 409:1-3, 8-12.) In the order signed by the district court, however, the corporations' pleadings were also stricken, and defaults entered against Janney and both corporations. This discrepancy was brought to the district court's attention (T. 1179; R. 986, 1030), but the court declined to change the order, apparently because the corporations' default was technical only since they were nominal defendants against whom no relief was demanded.

Following the default by some five months, the district court appointed a receiver on March 16, 1962. (T. 969.) On the authority of this appointment and a further order of May 24, 1962, the receiver began to

carry out his duties, which included expenditures of time, effort and money, and continued to do so until the Ninth Circuit Court of Appeals vacated the appointment. (Opinion, p. 33.) Pending the final order of the district court, the receiver is still carrying out these duties to protect the interests of the corporations and the shareholders.

The Court of Appeals also reversed the order striking the pleadings of the two corporations and entering their defaults. (Opinion, p. 32.)

The basis for the Court of Appeals' action in setting aside the corporate defaults was that cross-petitioners' motion for default was not directly aimed at the corporations (Opinion, p. 20) and that the default of Janney alone did not justify a default receivership of the corporations. (Opinion, p. 24.)

While stating that the district court should not have entered the corporate defaults, the Court of Appeals acknowledged that the district court had authority to do so. Rule 37(d) of the Federal Rules of Civil Procedure granted that power. (Opinion, p. 20.)

The Court of Appeals also criticized the appointment of the receiver as erroneous for three reasons (Opinion, pp. 24-25):

1) The prayer in the complaint did not give any specific notice that a receivership would be sought, although it did ask relief to restrain the corporations and Janney from exercising any control or entering into any transaction regarding the corporations.

2) The corporations were entitled to contest the application, even though Janney was in default and

even though he was noticed for deposition at least once as a representative of the corporations.

3) Receivership is an ancillary remedy, not justified by the substantive relief sought (which asked that certain real property taxes be paid and that the corporations be awarded damages of one million dollars from Janney), even though the receiver was to be the instrument for enforcing the judgment.

In so holding, the Court of Appeals assumed that the shareholders would be able to meet, elect new boards of directors, and conduct the affairs of the corporation as they deem best (Opinion, p. 25), even though the complaint showed that for many years Janney has managed, directed and controlled all the corporate activities (R. 624-25), and the Court of Appeals has observed that Janney, the corporations and their counsel have engaged throughout the litigation "in a course of obstruction and obfuscation." (Opinion, p. 2).

As to the financial responsibility for the receivership, the Court of Appeals has ruled that the cross-petitioners, though acting in good faith, should bear all costs of the receivership that would not have arisen but for the appointment. Only those expenses that the corporations would have been forced to incur had there been no receiver, and expenses that conferred a genuine benefit on the corporations, should be charged to the corporations.

There is no showing, however, that the cross-petitioners are in a position to compensate or reimburse the receiver for carrying out his duties.

The final matter with which this cross-petition is concerned is the district court's award to cross-petitioner Helen Dolman of $46,457.90 as expenses incurred or paid by her in prosecuting the derivative action and $75,000.00 as compensation for her services. (R. 1253.) Mrs. Dolman was not a shareholder of record at the time of certain disputed transactions, having acquired her shares on and after November, 1955. (T. 1294 *et seq.*; 1396 *et seq.*) She could not, therefore, have brought this action without joining other shareholders of longer standing as co-plaintiffs, since Rule 23(b) of the Federal Rules of Civil Procedure would have barred this derivative suit. It is implied that the shareholders with standing to sue would have been unable, without Mrs. Dolman's financial help, to bring this action. (T. 553-635, 677-843, 1470-1490, 1497.)

While recognizing the complete lack of authority to support or dispute this award, the Court of Appeals reversed it on the ground that such a result "would encourage a too easy avoidance of Rule 23 (b)." (Opinion, p. 28.)

The Court of Appeals decision thus negates the effect of the District Court ruling that Mrs. Dolman investigated the affairs of the corporations, searched the corporate records for shareholders' names and addresses, and inquired about shareholders whose names and addresses were not revealed in the record. She spent many hours and days in making investigations, travelling and writing letters to procure the information on which this action is based. The facts

about the corporations and Janney leading to the million dollar judgment against Janney and in favor of the corporations were almost entirely obtained from her labors. (R. 1250.)

REASONS FOR GRANTING THE WRIT

I

The Court of Appeals for the Ninth Circuit has set aside the default of two corporations while sustaining the personal default of their president and dominant figure. By so doing, the Court of Appeals has expressed disapproval of the District Court's implied finding that the corporations' default was technical only.

As a result, if the decision of the Court of Appeals is allowed to stand, a shareholder suing in behalf of a corporation will have to declare that he is actively seeking relief against the very corporation he is trying to benefit.

The Court of Appeals has set at odds, in a real rather than nominal sense, the shareholders and the entity they wish to save, while forcing the aggrieved corporation to ally itself with the very corporate officer who is charged with wasting, mismanaging and misappropriating its assets.

To require hostility between two parties who have been victimized by the same person is to distort the shareholders' legal right to protect corporate interests. A disclaimer of relief against a corporation should

not—despite the decision of the Ninth Circuit Court of Appeals—bar the entry of what is really a nominal default by the corporation so that the shareholders may obtain recovery from a defaulting corporate representative.

The Court of Appeals acknowledged that under Rule 37(d) of the Federal Rules of Civil Procedure, the District Court had power to enter these defaults. Because this power existed, because it was wisely used by the District Court, and because shareholder derivative suits will be artificially burdened with friendly "hostile" parties if the Court of Appeals decision is allowed to stand, the United States Supreme Court should reverse the decision of the Court of Appeals and restore that of the District Court.

II

Although a District Court may appoint a receiver even on an *ex parte* application (see *Tennessee Publ. Co. v. Carpenter,* 100 Fed.2d 728, 732 (6th Cir. 1938)); the Court of Appeals has termed erroneous the District Court's appointment of a receiver here because the complaint did not seek that specific relief. In support of the appointment, see also *Elk Fork Oil Co. v. Foster,* 99 Fed. 495, 498 (4th Cir. 1900); *Ferguson v. Bucks,* 280 Fed.2d 739, 743 (3rd Cir. 1960).

The Court of Appeals has thus taken the position that a District Court can order no effective action on behalf of corporations and their shareholders when it grants relief, properly within the scope of the prayer, as follows: to restrain the corporations, as well as

their president and dominant figure, from exercising any control or entering into any transactions with regard to the corporations, until further court order.

When the District Court properly granted the prayed-for relief, but was prohibited by the Court of Appeals from implementing it to avoid harm, the corporations were endangered by the loss of all management and control over their functions. They were left without anyone effectively responsible for carrying on corporate affairs or protecting corporate interests.

Recognizing this danger, the Court of Appeals suggested that the corporate shareholders might meet, elect new boards of directors, and conduct the affairs of the corporations. Whether that suggestion is feasible or not (and a fair reading of the record indicates it is not), the arrangements suggested by the Court of Appeals take time to complete. During this period of adjustment, may the District Court properly be concerned with what happens to the interests of the corporations and their shareholders? And if the District Court, whose valid order led to this predicament, finds that the corporate and shareholder interests can best be protected by use of the court's own agent—a receiver—is this preservative action to be deemed error just because the original complaint could not foresee such an eventuality?

The United States Supreme Court should not allow its District Courts to be so unnecessarily shorn of power to preserve the status quo.

III

The District Court appointed a receiver and gave him instructions which required the expenditure of money, time and effort. The Court of Appeals decided that the appointment was erroneous, and ruled that the receiver was to be denied compensation and reimbursement from the corporations unless the corporations would have had to incur those very expenses or the expenses conferred a genuine benefit on the corporations.

For his other expenses, the receiver was allowed no claim against the corporations.

The Court of Appeals acknowledged that a leading scholar has stated that all costs of a receivership, even when erroneous, are properly charged against the corporation's funds. (See 2 Clark Receivers §637.1(m), p. 1065.)

Not only does the Court of Appeals thus come in conflict with the District Court and with Dr. Clark, but its action places all orders of a District Court under a cloud. If the Court of Appeals' ruling is allowed to stand, and compensation is largely denied to the court-appointed receiver, what persons will feel free to accept appointment by a District Court and to carry out their assigned duties in confidence?

Unless the United States Supreme Court reverses the ruling of the Court of Appeals, and grants full compensation and reimbursement to a good faith receiver, the administration of justice will be thwarted

by widespread—and valid—doubts about the power of a District Court to protect its own agents.

IV

Because the shareholders' derivative suit (which resulted in a favorable one million dollar judgment) would have been unsuccessful but for the efforts and expenditures of Mrs. Helen Dolman, a cross-petitioner here, the District Court awarded her reimbursement for her expenses in prosecuting the action, plus compensation for her services in that cause. The Court of Appeals, noting the complete lack of authority on this point, reversed the award on the ground that such a result would encourage too easy an avoidance of Fed.R.Civ. Pro.No. 23(b). (It should be noted that Mrs. Dolman had not been a shareholder of record at the time of the disputed transactions, but developed and perfected the litigation by joining appropriate shareholders as co-plaintiffs.)

What the Court of Appeals says about an easy avoidance of Rule 23(b) may be true, especially since the rule seems designed to avoid strike-suits or the buying of litigation. But the cross-petitioners urge the United States Supreme Court to pursue this judicial assumption with a more searching analysis.

It is possible (and even probable) that the denial of reimbursement or compensation to a late-appearing shareholder will successfully insulate a corporate wrongdoer from any derivative actions. To establish this contention, there need only exist a corporation

which has been so mismanaged and defrauded that the shareholders cannot sell their shares for any reasonable figure and cannot afford to bring lawsuits against the corporate officer who is cheating them. In that event—and the record in this case supports such a condition—no outsider would lend assistance to the aggrieved parties because the courts have allowed no means of repaying that outsider for his beneficial conduct.

The existence of shareholders' rights, without corresponding economic benefits, may mislead innocent parties but cannot prevent wrongdoing or bring back misappropriated assets.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

GEORGE T. DAVIS,

Counsel for Cross-Petitioners.

CERTIFICATE OF COUNSEL

I hereby certify that I am counsel for cross-petitioner in the above entitled cause and that in my judgment the foregoing cross-petition for a hearing is well founded in point of law as well as in fact and that said cross-petition is not interposed for delay.

Dated, San Francisco, California,
December 28, 1964.

GEORGE T. DAVIS,
Of Counsel for Cross-Petitioner.

(Appendix Follows)

FEDERAL RULE OF CIVIL PROCEDURE NO. 23(b)

Secondary Action by Shareholders. In an action brought to enforce a secondary right on the part of one or more shareholders in an association, incorporated or unincorporated, because the association refuses to enforce rights which may properly be asserted by it, the complaint shall be verified by oath and shall aver (1) that the plaintiff was a shareholder at the time of the transaction of which he complains or that his share thereafter devolved on him by operation of law and (2) that the action is not a collusive one to confer on a court of the United States jurisdiction of any action of which it would not otherwise have jurisdiction. The complaint shall also set forth with particularity the efforts of the plaintiff to secure from the managing directors or trustees and, if necessary, from the shareholders such action as he desires, and the reasons for his failure to obtain such action or the reasons for not making such effort.

FEDERAL RULES OF CIVIL PROCEDURE, RULE 37(d)

Failure of Party to Attend or Serve Answers. If a party or an officer or managing agent of a party wilfully fails to appear before the officer who is to take his deposition, after being served with a proper notice, or fails to serve answers to interrogatories submitted under Rule 33, after proper service of such interrogatories, the court on motion and notice may

strike out all or any part of any pleading of that party, or dismiss the action or proceeding or any part thereof, or enter a judgment by default against that party.

FILE COPY

Office-Supreme Court, U.S.
FILED
FEB 27 1965
JOHN F. DAVIS, CLERK

In the Supreme Court

of the

United States

October Term, 19[illegible]

No. [illegible]

(No. [illegible])

HELEN DOLMAN, KATHERINE [illegible] FOX, JAMES KEITH [illegible], JR., E. F. R. DUVAL, and KATHERINE [illegible],

Cross-Petitioners,

vs.

PIOCHE MINES CONSOLIDATED, INC., ELY VALLEY MINES, INC., and JOHN JAKNEY,

Cross-Respondents.

CROSS-RESPONDENTS' BRIEF IN OPPOSITION TO CROSS-PETITION FOR A WRIT OF CERTIORARI

CHARLES O. BRUCE,
2140 Shattuck Avenue,
Berkeley, California,
Counsel for Cross-Respondents.

MORSE AND GRAVES,
116 South Fourth Street,
Las Vegas, Nevada,
ROSCOE H. WILKES,
P. O. Box 175,
Pioche, Nevada,
T. DAVID HORTON,
P. O. Box 261,
Pioche, Nevada,
Of Counsel.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

Subject Index

	Page
Introduction	1
Stockholders' meeting	6
Questions presented	7
Compensation sought for counsel who are acting against the interests of former clients	20
Corporate remedies were not exhausted	27
The cross-petition shows no basis for the default receivership	29
Conclusion	31

Table of Authorities Cited

Cases	Pages
Central West Publishing Co. v. Craig (CCA 8, 1924), 70 Fed. 2d 427	26
Duell v. Duell (CCADC, 1949), 85 App.D.C. 78, 178 Fed. 2d 683, 14 ALR 2d 560	26
Hovey v. Elliot, 167 U.S. 409	26
Marion Mtg. Co. v. Edmunds (CCA 5, 1933), 64 Fed. 2d 284	26
McVeigh v. U. S., 11 Wall. (78 U.S.) 259	26
Nottebaum v. Leckie (CCA 3, 1929), 31 Fed. 2d 556, Cert. den. 280 U.S. 558, 74 L. Ed. 613, 50 S. Ct. 17	26
Noxon Chemical Co. v. Leckie (CCA 3, 1930), 39 Fed. 2d 318, Cert. den. 282 U.S. 841, 75 L. Ed. 747, 51 S. Ct. 22	26
Tozer v. Charles A. Krause Mill Co. (1951), 189 Fed. 2d 242	26
Union Mutual Life Ins. Co. v. Union Mills Plaster Co. (1889), 37 Fed. 286, 3 LRA 90	26
Windsor v. McVeigh, 93 U.S. 274	26

Rules	
Rules on Appeal:	
Rule 23(b)	20, 28
Rule 30(b)	9, 26

Constitutions	
United States Constitution:	
5th Amendment	26
14th Amendment	26

Texts	
5 Alderson on Receivers, Section 52, pages 81, 82	26
Canons of Judicial Ethics, Canon 16	26
1 Clark on Receivers 127	26
16 Fletcher, Cyclopedia Corp. 69	26

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1964

No. 808
(No. 643)

HELEN DOLMAN, LAWRENCE RUST LEE, JAMES KEITH MARSHALL, JR., E. P. R. DUVAL, and KATHERINE HANSBROUGH,
Cross-Petitioners,

vs.

PIOCHE MINES CONSOLIDATED, INC., ELY VALLEY MINES, INC., and JOHN JANNEY,
Cross-Respondents.

CROSS-RESPONDENTS' BRIEF IN OPPOSITION TO CROSS-PETITION FOR A WRIT OF CERTIORARI

INTRODUCTION

This case presents difficulties that are unusual because it has to deal with events that cover a period of over thirty years. This results from obstructions to completing an action and counterclaim started in 1940 and still held up.

This must be completed before the stockholders' meeting of the merged companies can be based on a committed list of stockholders. The wrongful default of defendants, which are indispensable parties to a ruling to be reached in the recent litigation, adds to the difficulties, also the confusion and misunderstanding, resulting from withholding from the Court many controlling facts, that have to be dealt with, must be cleared up if justice is to be the end result of these proceedings.

To occupy a reasonable space the mention of a few instances of what the complete record would show, must be used to illustrate a system of procedure, where defamation of a management became a primary objective of a plaintiff who had invested no money in an enterprise, whose claimed stockholder associates have denied giving authority and where for forty years the same management had been satisfactory to investors of hundreds of thousands of dollars under supervision as shown by reports of entirely competent inspectors.

The central point of this case is the counterclaim action which this litigation is holding up and has been held up since the order of the Circuit Court of Appeals handed down in 1953. This deals with occurrences which make up a set of complicated obstructions to corporate financing. These extended from the burning of the Pioche Mine Company's mill in 1929 to the ending of the action on the Bonds which started in 1940 and was settled by agreement in 1943, but has been continued illegally until the Circuit Court of Ap-

peals' order of May 21, 1964 which ordered dismissal and accounting of the Receiver.

The present Dolman action now before the Court is based on the threat that unless the counterclaim was surrendered "ruinous litigation" would follow.

This threat, Exhibit L-2, is contained in a letter dated June 10, 1957, offered in evidence but excluded because of a default, which now is declared error by the Circuit Court of Appeals.

That the Court was misled by statements which should have been questioned, as conflicting with records on the facts testified to, is clearly shown.

The facts were excluded of an effort to establish a mining industry in the face of obstructions which default procedure has concealed and which is held error by the Circuit Court of Appeals in the case of the two defendant corporations and is plainly error in the case of the other defendant who is the President and leading stockholder of the corporation organized to handle these efforts.

Corporate records were ordered taken from the defendant corporation. These records were a necessary part of what had to be introduced to afford a basis for the complaint.

The withheld facts in these records show that the Pioche Mines Company organized in 1908 through a carefully worked out development and equipment plan, and the expenditures of nearly a million dollars of invested money, was fully equipped for a highly economical operation by 1929, when the mill burned.

The last $250,000.00 needed to effectually put the plan into production was offered if a Bond issue could be offered for this block of money.

This Bond issue was allowed as agreed and this is fully set forth in the Articles of Incorporation and Minutes of Incorporation of Pioche Mines Consolidated, Inc.

The properties to be put back of the Bonds issued were not in any instance properties that had been owned by Pioche Mines Company, they were completely separate properties listed in the incorporation papers.

John Janney the President and leading stockholder of Pioche Mines Company since 1908 has served as President and General Manager without salary or compensation by the corporation.

This saving of expense was the reason for the continuation to a successful conclusion, of the plan of development and equipment as is shown by the record of the corporation.

Mr. Janney and a small group of associated stockholders furnished three properties which saved the stockholders' investment at critical periods. He conveyed to Pioche Mines Consolidated the long term lease, he held, on the old mines of Pioche.

In payment he took stock at its par value to represent the exact sums that had been expended on the properties in recent development. The records show that Mr. Janney also has served the Pioche Mines Consolidated as President and General Manager without salary or compenstation.

His stock holdings represent his compensation for a lifetime of effort which has been recognized in many reports, as completely satisfactory, until 20 years after the event when plaintiff Dolman presented her statements which can not be maintained except in a default procedure.

The long tie-up of corporate financing has made necessary the unprecedentedly generous support of some investors. This support is condemned by Dolman in proportion as it is of benefit to the mining efforts.

In relation to this is the charge, which has not been allowed a hearing, that the Dolman action is in aid of the counterclaim conspiracy.

The Dolman untried and false claims are disastrous to the defaulted Pioche Mines Consolidated and are to the advantage of the Trust Company. This for the reason that it shows, or attempts to show, that the Trust Company has had to deal with a management that has been discredited.

It is now clearly established that the accomplishments of the Dolman default procedure has in every instance produced results which are an advantage to the Trust Company and that are contrary to the interests of all investors in all three corporations.

It is shown, by affidavits filed in the case that the wilful neglect and even planned injury, to the properties by an incompetent receiver, which has replaced what the record shows to be a highly competent, efficient management, serving without salary, will if continued destroy all investment by stockholders.

It is also shown that the continuation of the Dolman litigation will make the destruction of this entire effort complete and that this destruction has been brought about by the wrongful use of the processes of the law established for a contrary purpose.

STOCKHOLDERS' MEETING

The counterclaim which the Circuit Court of Appeals ordered in 1953 to be reinstated, is the controlling factor in the matter of stockholders' meetings. Because that counterclaim which has never been permitted to have a hearing, deals with a conspiracy that has obstructed the completion of the merger of three corporations, as provided for in the Settlement Agreement. This merger requires the exchange of securities and until the stock of the three merged companies is turned in, as the basis agreed for exchange, the whole proceedings are held in abeyance.

It is shown that the Dolman action, has held up the prosecution of this counterclaim since 1957, by threats of "ruinous litigation" unless this counterclaim was surrendered. The resulting litigation has prohibited completing the corporate structure so that a stockholders' meeting could be held.

In the meantime the record shows that the stockholders' meetings of the three merged companies is being held in adjourned session until the merger agreement could be completed. This can not be done until the trial of the counterclaim which calls for the Trust

Company to comply with the contract as to the securities it has undertaken to handle.

The Settlement Agreement, provided that a designated board of directors should handle the affairs of the corporations until the merger was completed. One of the directors was to represent the bondholders.

QUESTIONS PRESENTED

The questions presented in the cross-petition do not correctly reflect the facts and circumstances of the case.

I

Question one mistakenly assumes that the default of the Corporations arose from a Notice of Deposition directed to their President.

A. First, the Notice of Deposition of October 5, 1961, which led to the default was *not* addressed to the President of the Corporations (R 688).

Only once was the President's deposition noticed (R 284, notice of October 14, 1960) at which time the deposition of the Secretary-Treasurer was also noticed (R 283) by serving only local counsel (R 285) who sought to withdraw (R 290). No notice of these depositions was given to either the President or to the Secretary (T 178-T 180).

The depositions were set to take place in Pioche, Nevada, when the President was in Leesburg, Virginia, so he did not appear because of the failure of

local counsel to notify him (T 179, lines 6-9). The Secretary was in Pioche, so notwithstanding the lack of notice to him, the deposition of the corporations purportedly *was* taken by and through their Secretary, who is not the Managing Agent (Plaintiff's Exhibit 18).

It was uncontested that the President, Mr. Janney, had no notice (T 179, line 19-T 180, line 4) of this deposition.

This was the only Notice of Deposition that was addressed to either corporation. This Notice was addressed to two officers. The Cross-Petitioner saw fit to proceed through the officer who was not the Managing Agent. It was known to Cross-Petitioner's counsel that the Managing Agent was in the East on corporate business connected to the counterclaim against Fidelity-Philadelphia Trust Company (R 250, R 251). The President got no notice. Therefore, the Motion that was thereafter filed by Cross-Petitioner's counsel to strike the pleadings and enter the default of the corporations on the basis of this non-appearance was denied (R 1378). The corresponding Motion of the corporations for Relief from deposition by Oral Interrogatories Previously Noticed was granted (R 1378).

B. Second: There was no "wilful failure" of the Deponent to appear for the deposition on October 31, 1961 (Notice of Deposition, dated October 5, 1961, which preceded the entry of the default (R 688)). No hearing was ever had on whether the non-appearance

was wilful. The record is uncontradicted that the appearance of the Deponent for his deposition could have killed him (R 756).

In addition, a Motion under Rule 30(b) was on file showing:

(1) Lack of the Trial Court's jurisdiction to proceed under the sworn complaint (T 352:11, R 630);

(2) Failure of the Court and Plaintiff's counsel to honor their respective promises not to allow the Dolman litigation to impede the preparation of Trust Company counterclaim;[1]

(3) Failure of Cross-Petitioner's counsel to select a time for the Notice of Deposition that would allow the Deponent to recover;

(4) The disqualification of the attorneys to take the deposition (this matter is treated later herein);

(5) The pendency of Motions that showed that the Plaintiff bringing the action had no standing to sue and was in Court pursuant to extortionate threats and by virtue of fradulent false sworn statements (R 495, R 654, R 700).

The "judicial description" (Cross-Petition, pp. 2, 3) of the non-appearance "as a direct flaunting of the Court's authority" (page 3) is a description that is not based upon a hearing or notice to the party charged.

---

[1]These statements are set out in footnote 16 of Petitioners' Answer to Opposition, etc. in case Number 643.

It confuses two entirely different questions: The recommendation that defendant Janney not appear for a deposition (that his Physician advised could kill him), is confused with the proposal that defendant Janney appear for a physical examination, which required adequate notice. Such notice was never tendered. Only a delay of "a few days" to allow a *deposition* was tendered, when submitting to a deposition at that time could have killed the deponent (R 756).

The reason for respondent Janney's *inability* to appear for physical examination on half-day's notice from Houston, Texas, was the impossibility of performance (T 430, T 431) of the Order (T 464, lines 7-17).

The confusion of these two distinct matters appears to be based upon a misapprehension of the record (see, for example, footnotes 14 and 17 of "Petitioners' Answer to Opposition to Petition for Writ of Certiorari," October term, 1964, No. 643).

An attorney who would have recommended to an eighty-odd year old client to appear at a deposition when he was seriously ill, would be derelict in his duty.

C. Third, it is more than "at one point" that "counsel stated that no such relief (as default) was being asked against the corporations" (Cross-Petition, page 3).

In ordering the medical examination of Cross-Respondent Janney, the Trial Court stated at T 408:19-25:

"Now, in the event of the failure of Mr. Janney to submit to such examination at the time and place which is indicated, in Las Vegas, Nevada, at the place designated by the Doctors who may be called upon to make the examination, the Court, on application of the Plaintiff, will strike the pleadings of the said John Janney—aren't those corporations of which he is an officer made defendants?" (T 408:19-25).

In response to this inquiry, Counsel for Cross-Petitioner states:

"Mr. O'Connor. They are made defendants, but there is no relief prayed against the Corporation, *and the only Answer filed is an Answer by John Janney . . .*" (T 409:1-3, emphasis added).

At T 409:8-12 the following colloquy then takes place:

"Your Motion is directed to strike the pleadings of defendants.

Mr. O'Connor. *That is an error.*

Court. It is the pleadings of said John Janney?

Mr. O'Connor. *That is the only one that has been filed.*" (T 409:8-12, emphasis added).

After this statement of Counsel for Cross-Petitioner that the request to strike the pleadings of the corporations was a mistake, the Court caused the above-quoted passage from T 408:19-24 of the Transcript to be re-read three separate times. These re-readings occurred at T 409:18, T 409:24 to 410:5. Thus, the Court was led to believe that only the pleadings of John Janney were involved, NOT the Corporations.

When counsel for Cross-Petitioner represented that the pleadings of John Janney "is the only one that has been filed" (R 409:12), he omitted to consider the following facts shown in the record:

> This attorney had moved Judge Ross to strike portions of the corporations' Counterclaim that were contained in their Answer (R 212); he had, in concert with his client, communicated in circular letters to the stockholders (R 228, R 432) in an effort to mend a fatal defect of the complaint, which defect had been set forth in the corporations' Counterclaim (R 63:11-17); after the entry of the Opinion and Order of the late Judge John Ross, sustaining the correctness of the statements contained in the corporations' Counterclaim, this same counsel for Cross-Petitioners herein filed, on October 17, 1960, an Amended Complaint (R 623) seeking to cure this fatal defect by using the names of new stockholders that were necessary to maintain the suit (see Opinion, page 28), but who in fact had never employed said counsel or given their consent to the suit;[2] Counsel then filed an answer to the Counterclaim of the Cross-Respondent mining corporations (R 243), which was verified by his client, Helen Dolman (R 247); and after his client and the mining corporations were at issue on the Counterclaim of corporations, said counsel served a Notice of Deposition *upon* the

[2]The affidavits of these four "co-plaintiffs" affirmatively repudiating the claimed authority of said counsel are set out in Cross-Respondents' Brief, "Petitioners' Answer to Opposition to Petition for Writ of Certiorari, footnotes 5-9, and related text, Case No. 643.

> Cross-Respondent corporations, when they were the only parties who, at that time, had appeared in the action (R 282).

Counsel's representation to Judge Foley that the Answer and Counterclaim of the Cross-Respondent corporations did not exist was, however, not the end of said counsel's oversight.

When the written order was presented to Judge Foley for signature, two days later (R 745), it provided:

> "Now, Therefore:
> It Is Hereby Ordered That defendants' pleadings be stricken, default entered and this matter set for hearing on November 7, 1961, . . ." (R 747.)

Thus, the Answer and Counterclaim of the corporations, which had been represented to the Trial Court not to exist, was struck through the change made by Cross-Petitioner's counsel in a written order that did not follow the oral instructions of the Judge (T 508, T 409).

II

The second "question presented" asserts that the default receivership was, "to protect the corporate interests pending a stockholders' meeting" (Cross-Petition, page 3). The default receivership did *not* protect the corporate interests:

1. No bond was required of those seeking the receivership to protect the corporations against the extensive damages that have arisen out of the

wrongful appointment. The receiver's bond is security only against the receiver's wrongful acts, and covers only a part of this damage. There was no bond whatever to cover the damages arising out of the wrongful *appointment* by default.[3]

2. The bond required of the receiver was grossly inadequate to protect the corporate interests against the damages deliberately inflicted upon the properties (R 1240ff, R 1215, 1217ff). The properties which were in good repair when the receiver took over (T 1883, T 1896) have been allowed by the Receiver to fall into disrepair and two and

---

[3]In referring to the injunctive provisions on which no Cross-Respondent was heard, the Opinion states:

"the (receiver's) bond, however, is not the customary form of bond issued when an injunction is obtained." (Opinion, page 27)

The *reason* it is not the "customary form" is because a receiver's bond fails completely to give any protection whatever to the parties who are entitled to protection *from the damages arising from a restraining order* (Rule 65(c), F.R.Civ.P.).

The receiver's bonding company is liable on the bond only to the extent of the receiver's defalcations. If he performs correctly, the Corporations and their President can each be damaged by the restraining order, and no liability whatever will arise on the receiver's bond to protect them.

The Opinion concludes (page 27) that the President of two corporations may be enjoined without either the corporations or the President being heard, on the basis that:

"there are findings that he has wrongfully done so (disposed of corporate assets) as to Pioche, . . . etc." (Opinion, page 27)

Yet these "findings" were made with all defendants defaulted, on the basis of the misrepresentations by an attorney to the Court (see introduction to "Petitioners' Answer to Opposition for Writ of Certiorari, case number 643), without either pleading or proof to support the representations, while the defendants are prevented from exposing the falsity of the representations on the basis of the default (e.g., T 710, T 711. Other examples appear under the heading "Default Excluded All Petitioners" in "Petitioners' Answer to Opposition to Petition for Writ of Certiorari," case number 643).

one-half million dollars of damage, or more, is threatened from this neglect (see, for example, "Motion to Remove Receiver, Compel Restoration of Funds, and for Citation of Receiver for Civil Contempt" (part of Vol. 25 of Transcript of Record)).

3. Cross-Respondents were not allowed to show that the corporate interests had been fully protected by the management that was replaced. Cross-Respondents were not allowed to show that, despite the lack of corporate funds with which to protect the properties, funds were advanced by the management replaced, when funds were not available from any other source, and the properties were completely protected at a small fraction of the sums spent by the receiver. Cross-Respondents were not allowed to require a showing of "immediate, irreparable injury" which is required for the entry of even a restraining order, let alone a default receivership.

4. The receiver deprived the properties of fire protection (R 1206, R 1215, R 1218, R 1221); drove the corporations' resident watchman off the properties; converted receivership funds to his own use and to the use of his principal Helen Dolman (R 1193ff. See also Motion to Remove Receiver, Compel Restoration of funds etc.); failed to preserve the right of the corporations to their unpatented mining claims; and failed to carry out the instructions of the Trial Court and the instructions of the Court of Appeals on its

order on Motion for Order to Preserve Status Quo Pending Appeal (attached as Exhibit A to Motion to Remove Receiver, etc., Vol. 25,).

5. The only benefit that was gained by anyone out of the receivership was that gained by Fidelity-Philadelphia Trust Company in being protected, during the receivership, from accountability on the counterclaim.

In addition, the Receivership was not limited to any such purpose as "pending a stockholders' meeting." As the Court of Appeals observed (Opinion, page 25):

> "A receivership is not an end in itself; it is but a means to an end. Here no end was sought. Under the judgment, none is in sight." (Opinion, page 25).

The only "end" that has *resulted* from the receivership has been the protection of the Trust Company from accountability on the counterclaim that is still pending against that Bank.

According to this counterclaim, filed by Cross-Petitioners' counsel when representing Pioche Mines Consolidated, Inc. and John Janney, *the wrongful acts of the Trust Company* are asserted to be the reason why the stock structure of Pioche Mines Consolidated, Inc. is clouded and indefinite:

> "Fidelity-Philadelphia Trust Company acting in collusion with Debenture Holders' Committee, retained said Income Bonds *and said shares of stock* and refused to exchange them." (R 5:25-29, emphasis added).

This Settlement Agreement is still not performed, and the obstruction of this agreement *by Fidelity-Philadelphia Trust Company* is one of the elements of damage *formerly* asserted by Cross-Petitioners' counsel on behalf of their then-clients, Pioche Mines Consolidated, Inc. and John Janney.

Finally, there is neither allegation nor proof in the record to support a receivership "pending a stockholders' meeting," which the Cross-Petition now asks this Court to direct by default.

III

The third "question presented" assumes that the receiver has expended money on the corporations' behalf, rather than squandering corporate funds in his own behalf.

The "question" assumes that the Receiver has "carried out his duties;" whereas the Receiver wholly failed and neglected to carry out his duties and preserve the corporate properties.

The Opinion of the Court of Appeals would fully protect a *bona fide* receiver, who had complied with the lawful orders of the District Court and the Appellate Court. The Opinion provides:

> "That those costs of the receivership that would not have arisen but for the appointment *should be charged against the party invoking the receivership, here the appellees.*" (Opinion, pages 31, 32).

The corporations deny that the receiver has acted "in good faith," and assert that the principal purpose of the receivership has been to protect the Trust Com-

pany by destroying corporate assets that otherwise could finance the prosecution of the counterclaim, and by allowing the receiver's attorneys to take over their former clients' counterclaim against the Trust Company.

IV

The corporations should also be heard on the statements assumed to be true in the fourth "question presented."

Pioche Mines Consolidated, Inc., denies that the judgment is any "benefit" to that corporation.

It is no longer contended that the action in any way "benefits" Ely Valley Mines, Inc. Yet both corporations were sued herein. The Cross-Petition seeks to restore a receivership of both corporations without their having been heard.[4]

Cross-Petitioner Dolman also asks this Court to "compensate" her "for the value of her services and those of her attorneys" (Cross-Petition, page 3), again, without Cross-Respondents being heard.

---

[4]The Trial Court refused to hear Cross-Respondents on the question of receivership, because of the default:

"Mr. O'Connor. . . . Now, with the Court's permission I would like to address myself to our application for the appointment of a receiver. . . .

Mr. Horton. Can we be heard on that question?

Court. *No, it is a default case. You are in default.* . . .

Mr. Horton. *We would like to put on evidence in regard to this.*

Court. *No, you are not going to put on evidence at all. You are in default.*

Mr. Horton. *I would like to correct facts that have been misrepresented by counsel and not supported by the evidence.*

Court. *You are observers as far as all objections in this case are concerned, . . .*" (T 1579, T 1619, T 1620; emphasis added).

The only "services" rendered by Cross-Petitioner Dolman, who is not qualified to bring this action, are those she performed for Fidelity-Philadelphia Trust Company in protecting that corporation from accountability on a counterclaim.

Cross-Respondents deny that she has expended any funds "in the corporation's behalf," (Cross-Petition, page 3) but that those funds were supplied by said Trust Company to carry out said Dolman's extortionate threats to "stir up the stockholders" and to prevent the collection of the counterclaim against that Bank. And the corporations have not been heard on these issues.

The record shows clearly that "Dolman had no standing to prosecute the action" (Opinion, page 28) and further shows:

> "It was only because she and her counsel brought in other stockholders . . . that the Court could proceed to judgment against Janney. The record also shows that the other stockholders were brought in by Dolman and her counsel on the express representation and understanding that there would be no expense to them." (Opinion, page 28)[5]

Cross-Petitioner Dolman has invested no funds in the Cross-Respondent corporations, and procured her

---

[5]The Cross-Petition protests (page 7) that the stockholders whose names were used in this case without authority are not "in a position to compensate" for the charges which the Appellate Court has ordered to be assessed against them.
Cross-Petitioner's statement brings into clear focus the nature of the representations of Dolman and her counsel in attempting to induce stockholders to join, "on the express representation . . . that there would be no expense to them." (Opinion, page 28)

stock through fraud. To allow such a party to carry out her extortionate threats against the corporations without complying with the requirements of Rule 23(b) or allowing the corporations to be heard, would require the exercise of legislative authority. No Court has such authority.

COMPENSATION SOUGHT FOR COUNSEL WHO ARE ACTING AGAINST THE INTERESTS OF FORMER CLIENTS

The request for attorneys' fees to Cross-Petitioner's counsel should be considered in the light of the nature of the case in which the fees are sought.

The Court of Appeals states:

> "We might feel, if we were counsel, we should not have participated in the present litigation" (Opinion, p. 12).

However, the Court of Appeals says with regard to the counterclaim wherein Cross-Petitioner's counsel represented Pioche Mines Consolidated, Inc. and John Janney:

> "We have examined the counterclaim in the Fidelity case, which is in the transcript (R 2), and we find that the issues there are quite different from the issues here." (Opinion, p. 12).

It is true that *some* of the issues are different. It is also true that *other* issues are identical, and counsel who once undertook to represent Cross-Respondents with regard to these issues, have now undertaken employment wherein they assert the exact *opposite* of the position that they once undertook to defend. The

former clients were not heard, because of the default, on the issues where said counsel had changed sides.

These attorneys frankly admitted that the principal object of their second client was "largely accomplished" when they obtained control of their former clients' counterclaim that had not yet been brought to trial (see footnote 7).

Examining the *pleadings* to determine the conflict of interest between the two sides that had been represented by counsel, apparently did not reveal with sufficient clarity the following *similarity* of issues. This similarity would have been revealed at a hearing on the merits, where *proof* rather than *pleading* would be the test. This hearing has been denied all Petitioners, and could have shown:

(a) In the counterclaim filed by Cross-Petitioner's attorneys against Fidelity-Philadelphia Trust Company (R 2, R 26, lines 20, 24, 25, 29-31) *Cross-Petitioner's counsel undertook to show that the Ely Valley Mine belonged to John Janney;*[6] they now assert that he held it in Trust for

---

[6]In the counterclaim filed by Cross-Petitioner's counsel on behalf of John Janney, it is averred:

"This defendant owns more than one-fifth of the issued capital stock of Pioche Mines Consolidated, Inc. and has since its incorporation, supervised and managed its operations, and *a large part of the money invested in its development has been invested because of this defendant's good name and reputation as a mine manager.*

"*This defendant also owns interests in other mining properties* and prior to the acts of Fidelity-Philadelphia Trust Company as herein set forth, had earned and *acquired a reputation as a capable and successful mine manager,* and, *this favorable reputation is an important asset* and of special value *in association with the ownership of mining property* or other mining interests." (Counterclaim against Fidelity-Phila-

someone else; "wrongfully converted the said mine for his own use and purposes"; and "at all times involved herein, defendant John Janney wrongfully concealed . . . the true facts concerning his wrongful misappropriation of the Ely Valley Mine" (Opinion, page 21).

(b) In the counterclaim filed by Cross-Petitioner's attorneys, they undertook to prove that the *wrongful acts of the Trust Company* caused Pioche Mines Consolidated "properties to depreciate in value and saleability" (R 10, line 20), and the amount of this reduction in the value of the assets of the Pioche Mines Consolidated is set at $4,000,000 (R 7, lines 2-4; R 14, lines 14, 15; R 23, lines 15-19).

In the instant case, Cross-Petitioner's *now* assert that the reduction in the value of the assets of one of their former clients, Pioche Mines Consolidated, was *not* due to the wrongful acts of the Trust Company conspiracy, but was due instead (to the extent of "in excess of One Million Dollars ($1,000,000.00)" (Opinion, page 21)) to the fact that *another* of their former clients, John Janney, had "converted" a mine belonging to

---

delphia Trust Company, signed and filed by Cross-Petitioner's counsel, R 26, lines 14-25)

The proof, if a hearing had been allowed, would have shown that the "interests in other mining properties" above referred to had, as its principal reference, *the interest of John Janney in the Ely Valley Mine*, which said counsel now represent was *not* owned by their former client John Janney, but was in fact owned by their former client Pioche Mines Consolidated, Inc. Yet neither former client was allowed a hearing on this matter or upon the qualification of Cross-Petitioner's counsel to assert the claim.

Pioche Mines Consolidated, and "wrongfully used" over $1,000,000.00 therefrom "for his own purposes" (Opinion, page 21).

Every cent of the million dollars' damage asserted in this second case *detracts from* the measure of damage formerly asserted by Cross-Petitioner's counsel *on behalf* of Pioche Mines Consolidated, Inc. in the first case—This measure being the difference between the value of corporate assets before the acts complained of on behalf of Pioche Mines Consolidated, compared to this value after the Trust Company's acts had done their damage. Cross-Petitioner's counsel now assert that *during this time,* the assets of Pioche Mines Consolidated were depleted to the extent of "over one million dollars" by the defalcations of another of their former clients, President Janney, whose "good name and reputation" they also at one time undertook to vindicate from the very same calumnies that they now assert. Yet the default prevented either one of their former clients from defending against either the conduct of their former attorneys, or their charges.

(c) Part of the *proof* of the conspiracy-counterclaim filed by Cross-Petitioner's attorneys against Fidelity-Philadelphia Trust Company was that the efforts of the Trust Company were aimed at "financially crippling Consolidated so that it could be taken over cheaply by the debenture-holders" (202 Fed. 2d 944, 946).

The financial burdens heaped on the corporations by the litigation held wrongful (202 Fed 2d 944, 206 Fed 2d 366, 237 Fed 2d 164) were such as "would kill any ordinary corporation" (T 97, lines 4-8).

Part of the *proof* of the Trust Company counterclaim formerly pleaded by Cross-Petitioner's counsel was, (1) that the reason for the failure of the conspiracy to achieve its object against Pioche Mines Consolidated was the willingness of John Janney, its President, to sacrifice several farms and properties owned by him, and authorize the use of one of his mining properties, the Ely Valley Mine, to defeat the action of the debenture holders; and (2) that with this help, and by serving as President without salary, these obstacles were overcome.

However, in the instant litigation, said counsel claimed: "they take five million dollars, approximately, out of the Ely Valley Mine and that goes into John Janney's pocket" (T 541, 2-4); and that corporate financial arrangements had been blocked by Mr. Janney and "that those transactions had not gone through because of John Janney's demand for personal benefits on top of the purchase price to the corporations" (Opening Statement in Dolman case. T 542, 22-24).

Yet all defendants are defaulted on such charges, when brought by attorneys who formerly undertook *on behalf of* their former clients *to prove: "a large part of the money* ('in excess of

> $1,000,000.00') *has been invested because of this defendant's good name and reputation* as a mine manager" (Counterclaims of Pioche Mines Consolidated, Inc. and John Janney, R 26, 10-18).
>
> Thus, the reason for *the ability of the corporation to acquire funds*—the "good name and reputation" of its President (Counterclaim, R 26)—is directly attacked by these former attorneys, without either their former client that benefitted from this reputation or the former client who had this reputation being heard, because the default of the two former clients was obtained by these former attorneys through noticing a deposition *after* they learned that their former client was ill and would need time to recover from a sickness that "could have resulted in his death" (R 756).

Matters of this nature cannot be correctly determined in default proceedings where proof is not required of the new allegations of the former attorneys, and where proof of the opposite position is not allowed to be advanced by the former clients.

Cross-Petitioner's counsel changed sides in the same suit, and sought to and obtained, control of their former clients' counterclaim.[7]

Serious though complicated questions of professional ethics are involved here. They are not such as can be determined by an examination of the pleadings,

---

[7](T 2699, lines 11-16), where the object of the Dolman litigation is announced to be "largely accomplished" when the Court directed these attorneys to "take over" the counterclaim of their former clients against the Trust Company. See also T 2696, lines 19-25.

without ever having a hearing requiring *proof* of either party's contentions.

Cross-Respondents should not be penalized because they sought to present the question of the disqualification of Cross-Petitioner's counsel as a preliminary matter by filing a motion under Rule 30 (b). This course was called for in order to avoid possible claim of waiver that might arise by proceeding further in a case where counsel were disqualified, and was also necessary to protect the deponent's health.

If the advice of the attorney to his client that he need not jeopardize his health by coming in person was wrong, then $1,000,000 penalty (based on the "sketchy pleading" (Opinion, p. 21) of a claim based on fraud by a party's former counsel, in a case which showed lack of jurisdiction), is too strong a penalty to be applied for following this bad advice. Inflicting this penalty without allowing the party to be heard is taking of property with due process of law, as is the appointment of a receiver.[8]

---

[8]U.S. Constitution, Amendments, 5, 14; *Windsor v. McVeigh*, 93 U.S. 274, 276-8; *Hovey v. Elliot*, 167 U.S. 409, 413, 414, 417; *McVeigh v. U. S.*, 11 Wall. (78 U.S.) 259, 267; *Nottebaum v. Leckie* (CCA 3, 1929), 31 Fed. 2d 556, Cert. den. 280 U.S. 558, 74 L. Ed. 613, 50 S. Ct. 17; *Duell v. Duell* (CCADC, 1949), 85 App.D.C. 78, 178 Fed. 2d 683, 14 ALR 2d 560; *Noxon Chemical Co. v. Leckie* (CCA 3, 1930), 39 Fed. 2d 318, Cert. den. 282 U.S. 841, 75 L. Ed. 747, 51 S. Ct. 22; *Union Mutual Life Ins. Co. v. Union Mills Plaster Co.* (1889), 37 Fed. 286 (5), 3 LRA 90; *Central West Publishing Co. v. Craig* (CCA 8, 1924), 70 Fed. 2d 427, 429; *Marion Mtg. Co. v. Edmunds* (CCA 5, 1933), 64 Fed. 2d 284, 251; *Tozer v. Charles A. Krause Mill Co.* (1951), 189 Fed. 2d 242; Canons of Judicial Ethics, Canon 16; 5 *Alderson on Receivers*, Section 52, pages 81, 82; 1 *Clark on Receivers* 127; 16 *Fletcher*, Cyclopedia Corp. 69.

Attorneys who bring suits of this nature are entitled to no award for "counsel fees."[9]

CORPORATE REMEDIES WERE NOT EXHAUSTED

At page 25, the Opinion states:

> There is a charge that Janney controls the corporations and their boards of directors, and has abandoned them and their properties, and that he has profited at their expense. But for all that appears, upon termination of his control by an injunction, or even without it, the stockholders would be able to meet, elect new boards of directors, and conduct the affairs of the corporations as they deem best. Nothing in the complaint indicates that they would not. In this respect, the motion for the appointment of a receiver, filed as a part of the motion for default judgment, adds little. It indicates that plaintiff Dolman has obtained a list of stockholders, has ascertained the addresses of many of them, and holds their proxies. For all that appears, they can control the corporations.

---

[9]Cross-Respondents submit that the only review that would be proper of the disposition made by the Court of Appeals on the matter of attorneys' fees would be to set aside any award for fees and for any relief on the Complaint.

Cross-Petitioner's Trial Memorandum (R 773) admitted that their Nevada counsel had been paid in full under his contract of employment and was entitled to no further compensation. Cross-Petitioner's Memorandum stated:

> "no further recovery is sought for him in this action." (R 802)

But the Trial Court, *sua sponte*, directed:

> "the sum of Fifteen Thousand Dollars ($15,000.00) is hereby ordered and adjudged to be paid to (local Nevada counsel)." (R 1241)

Cross-Respondents cannot find any precedent for granting an attorney compensation above and beyond what he agreed to serve for, and what was asked.

Thus, even in a default proceeding, where the Cross-Respondents were wrongfully excluded, the record made by Cross-Petitioner Dolman does not prove the allegations that it is necessary that she prove in order to sustain a secondary action under Rule 23 (b) F.R. Civ. P.

If, "for all that appears, they (Cross-Petitioners) can control the corporations," then there is a corporate remedy available for the purported wrongs, and there is no standing to sue in equity in a derivative capacity.

When to this is added the fact that Cross-Petitioner Dolman flatly *refused* to state her grievances to the stockholders,[10] and the fact that the stockholders who were claimed to have authorized the action, and who were indispensable to the maintenance of the action, have each repudiated the claimed authority of counsel for Cross-Petitioner Dolman to represent them, it would appear that the only disposition of the instant case that may properly be made under Rule 23 (b) is to dismiss it.

---

[10]Extracts from the stockholders' meeting where this refusal appears are given in footnote 1 of "Petitioners' Answer to Opposition to Petition for Writ of Certiorari", case No. 643.

THE CROSS-PETITION SHOWS NO BASIS FOR THE DEFAULT RECEIVERSHIP

If, the Cross-Petitioners insist, the action of the District Court "left (the corporations) without anyone effectively responsible for carrying on corporate affairs or protecting corporate interests," (Cross-Petition, p. 11), this is further demonstration of the error of excluding the corporations from their right to oppose the action. It is certainly *not* an argument for continuing a receivership on which they were not allowed to be heard.[11]

The Cross-Petition asserts that Mrs. Dolman "developed and perfected the litigation by joining appropriate shareholders as co-plaintiffs" (Cross-Petition, page 13). This statement should go on to say, "without either their knowledge or their consent."

In addition to the several substantial reasons cited by the Court of Appeals for reversing the receivership (Opinion, pp. 24-26), other reasons, equally as compelling, also required his dismissal:

> The Receiver was the agent (R 436) of the party who brought the action pursuant to her extortionate threats (R 1267, par. 8, T 2239: 18-T 2240:11, R 1268, T 3044, T 3045), and was totally unfamiliar with mining matters (R 1220).
>
> The purported purpose of the Receiver's appointment was to preserve the properties and save expense. The Receiver then neglected the properties, multiplied expenses with lavish unau-

[11]See footnote 4 above.

thorized expenditures, and sought and obtained from Trial Court an Order that would result in the destruction of Two and One-Half Million Dollars worth of mine development work (T 1641-T 1643) and many hundreds of thousands of dollars worth of modern improvements, in order to reimburse said Receiver for his expenditures that had been neither authorized nor approved.

Whereupon, the Court of Appeals, in order to avert this destruction of the corporate properties, on December 5, 1963, entered its order, "On Motion for Order to Preserve Status Quo Pending Appeal" in which it was ordered:

> "the sale of any such equipment, supplies and buildings which may be indispensable to preserve the underground workings of such mine properties . . . is stayed . . ."
>
> "no equipment, supplies and buildings may be sold during the pendency of these Appeals . . ." (Exhibit A, attached to Motion to Remove Receiver, Compel Restoration of Funds, etc., Vol. 25 of Transcript of Record).

For the Court of Appeals to have sanctioned such a Receivership would be a substantial departure from the former equity practice that is adopted by Rule 66, F.R. Civ. P.

CONCLUSION

For the reasons above it is respectfully submitted that if this Honorable Court grants certiorari on the Cross-Petition, it should be limited to the sole question of whether the Opinion below should be reversed and remanded with instructions to dismiss.

Respectfully submitted,
CHARLES O. BRUCE,
Counsel for Cross-Respondents.

MORSE AND GRAVES,
ROSCOE H. WILKES,
T. DAVID HORTON,
Of Counsel.